No. 79-1502

IN THE

Supreme Court of the United States

MICHAEL RODAK, JR., CLERK

October Term 1980

KERN COUNTY WATER AGENCY, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, SANTA CLARA VALLEY WATER DISTRICT and TULARE LAKE BASIN WATER STORAGE DISTRICT,

Petitioners,

vs.

SIERRA CLUB, *et al.*,

Respondents.

BRIEF FOR PETITIONERS PUBLIC WATER AGENCIES.

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SIERRA CLUB, *et al.*,

Respondents.

QUESTIONS PRESENTED.

This case presents the following questions:

1. Does the Rivers and Harbors Act of 1899 (33 U.S.C. §§ 401-418) create a private right of action that authorizes plaintiffs to commence and prosecute this action?

2. Does Section 10 of the 1899 Act (33 U.S.C. § 403) require a California state agency to obtain a federal operating permit from the United States Army Corps of Engineers, in order to divert water for reasonable, beneficial public uses, even if that diversion (1) represents the exercise of water rights established and regulated under state law, (2) is made through pumping facilities that are not located in navigable waters, (3) is made from an artifically created body of water, (4) is made through an intake structure which has been approved and permitted under the 1899 Act, and (5) does not interfere with navigation?

3. If the 1899 Act does require an operating permit, does the Section 10 permit that the Corps of Engineers issued to the California Department of Water Resources for the intake structure for Clifton Court Forebay prior to the filing of this action, satisfy that requirement?

PARTIES BELOW.

The parties to the proceeding in the Ninth Circuit whose judgment is sought to be reviewed consisted of:

1. The following plaintiffs, who are respondents in this Court:

The Sierra Club, a non-profit California Corporation,
Friends of the Earth,* a non-profit New York Corporation,
Hank Schram, a commercial fisherman, and
William Dixon, a landowner.

2. The following federal defendants, whose predecessors had originally been named as defendants in their official capacities, and who as appellants were given partial relief by the Circuit Court's opinion:

Cecil D. Andrus, Secretary of the Interior
Clifford L. Alexander, Secretary of the Army
R. Keith Higginson, Commissioner of the Water and Power Resources Service
Lt. Gen. Joseph K. Bratton, Chief of Engineers of the Army Corps of Engineers
Lt. Paul F. Kavanaugh, the Corps' Sacramento District Engineer
Col. Paul Bazilwich, Jr., the Corps' San Francisco District Engineer.

3. The following state officials, whose predecessors had also been originally named as defendants in their official capacities and who are petitioners in this Court:

Huey D. Johnson, Secretary of Resources
Ronald B. Robie, Director of the Department of Water Resources.

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*The Circuit court's opinion ordered the District court, on remand, to dismiss plaintiff Friends of the Earth for lack of standing. (Ptn. App., pp. 25-26).

4. Four California public water agencies that have contracted with the state for delivery of the water supply that is the subject of this case. Those agencies intervened on behalf of the State defendants when the action was before the District Court and are petitioners in this Court.

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BRIEF FOR PETITIONERS PUBLIC WATER AGENCIES.

OPINIONS BELOW.

The Decision of the Ninth Circuit Court of Appeals is officially reported at 610 F.2d 581 and is reproduced on pages 5 to 62 of the Appendix to our Petition for Writ of Certiorari. The Decision of the District Court is officially reported at 400 F.Supp. 610 (N.D. Cal. 1975) and is reproduced at pages 63 to 129 of that same Appendix.[1]

JURISDICTION.

The Decision of the Court of Appeals was entered on October 31, 1979. The plaintiffs filed a petition for rehearing on November 21, 1979, which was denied on January 17,

[1]Hereafter referred to as "Ptn. App."

1980. Our Petition for Writ of Certiorari was filed on March 17, 1980 and was granted and consolidated with No. 79-1252 on October 6, 1980.[2] This Court has jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL LAWS INVOLVED.

This case involves an interpretation of Sections 10, 12 and 17 of the Rivers and Harbors Act of 1899 (30 Stat. 1151, 1153 (1899), 33 U.S.C. §§ 403, 406 and 413). These provisions are set forth in the appendix to this brief.

This case also involves an interpretation of 38 federal statutes that recognize State authority to regulate, under state law, water supply diversions. The relevant sections of those statutes are set forth in the Appendix to our Petition For Certiorari (Ptn. App., pp. 130-149).

STATEMENT OF THE CASE.

This case presents two fundamental controversies concerning the Rivers and Harbors Act of 1899. First, it presents a controversy over whether the language of the 1899 Act can reasonably be interpreted as creating a private right of enforcement, in light of several recent cases decided by this Court.

Second, it presents a controversy over the extent to which Congress intends to subordinate state water rights law to federal regulation. The circuit court opinion subordinates state law in a situation in which that law is not inconsistent with congressional directives within the meaning of this Court's decisions in *California v. United States* (438 U.S. 645, 98 S.Ct. 2985 (1978)) and *United States v. New Mexico* (438 U.S. 696, 98 S.Ct. 3012 (1978)).

The State of California has constructed and is operating a multi-billion dollar water project pursuant to the California

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[2]The State of California filed a similar petition on February 13, 1980 under No. 79-1252. The Court also granted that petition on October 6, 1980.

Water Resources Development Bond Act[3] (Cal. Water Code § 12930, *et seq.*). The State's electorate and the California Supreme Court have approved the project (Jt. App., p. 89a; *Metropolitan Water District v. Marquardt,* 59 Cal.2d 159 (1963)). The California Department of Water Resources (DWR) operates the SWP (Ptn. App., pp. 70, 71).

Intervenors and 27 other public water agencies have contracted with the State to repay the costs of constructing and operating the SWP, in return for deliveries of specific quantities of SWP water over at least the next fifty-five years. Petitioners need that water to meet the reasonable requirements of over half the people of the state and a significant proportion of California's agricultural economy (Ptn. App., pp. 8, 9, 66; Jt. App., pp. 99a-114a; State Exhs. 30, 31; R 495A-504, 506, 574, 956, 957).

Petitioners' contracts with the State for delivery of water from the SWP constitute an essential element of the SWP.[4] They provide the basic means for financing the multi-billion

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[3]That project is technically identified by the Bond Act as the State Water Resources Development System (Cal. Water Code § 12931) but is commonly referred to as the State Water Project and will be generally designated hereafter as the "SWP".

[4]Those contracts and their reliance on State water law received wide public exposure and approval prior to initiation of SWP operations. The State's electorate approved the contracting authorization and its underlying financial structures, in November 1960 (Ptn. App., p. 66). The State Legislature subsequently reviewed and approved the terms of the prototype contract which the State executed with The Metropolitan Water District of Southern California, one of the petitioners herein. All of the SWP contracts are essentially the same as that contract. (September 5, 1974 *Joint Brief of Intervenors Upon Completion of the Trial on Entitlement to Relief;* District Court Docket Item 111.) In addition, the California Supreme Court upheld the constitutionality of both the prototype SWP contract and the Bond Act. (*Metropolitan Water District v. Marquardt, supra.*) Furthermore, local superior courts validated all of the other SWP water contracts, *e.g., Kern County Water Agency v. Purvines,* Kern County No. 90825 (1964); *Santa Clara County Flood Control and Water District v. State,* Santa Clara No. 151052 (1964); *Tulare Lake Basin Water Storage District v. All Persons,* Tulare County No. 17250 (1965).

dollar SWP and meeting the State's related constitutional limitation on State indebtedness (California Constitution Article XVI, Section 1). Those contracts are premised on the application of State water law to SWP's water diversions from the Sacramento-San Joaquin Delta, a navigable intrastate body of water, (Delta) (Ptn. App., p. 66; Joint Brief of Intervenors, District Court Docket Item 111).

The United States has built a similar multi-billion dollar water project, known as the Central Valley Project (CVP), to provide water for important public uses in the San Joaquin Valley and the South San Francisco Bay Area (Jt. App., pp. 91a-93a). The United States Water and Power Resources Service (WPRS), formerly the Bureau of Reclamation, operates the Central Valley Project (Ptn. App., pp. 9, 69, 70; Jt. App., pp. 91a-93a).

DWR and WPRS divert water from the Delta for the SWP and the CVP pursuant to water rights permits previously issued by the State of California through the California Water Resources Control Board (WRCB). The WRCB regulates those diversions under an extensive body of State water law. The State has developed that law through comprehensive constitutional and statutory controls, California Constitution, Article X, Section 2; Cal. Water Code Part 2, Division 2, and implementing judicial rulings (*Environmental Defense Fund v. East Bay Municipal Utility District*, 26 Cal.3d 183, 194 ff (1980)), in order to assure that California's water resources are used in an economically efficient and environmentally sound manner (Public Resources Code § 21000, *et seq.*).

The WRCB has reserved continuing jurisdiction over the SWP and CVP water rights permits in order to coordinate SWP and CVP water diversion operations and to protect prior vested water rights, water quality in the Delta, and fish and wildlife resources. Accordingly, the WRCB limits SWP and CVP operations to maintain specific salinity and

streamflow conditions in the Delta channels at specific times.[5]

Essentially, all the water supplies for the SWP are currently diverted from the Sacramento-San Joaquin Delta (Delta) through a water diversion facility known as the Delta Pumping Plant. (A map of the Delta, showing the Delta Pumping Plant in the southern portion thereof, is attached to the District Court opinion, Ptn. App., p. 129A.) That facility is located outside navigable waters and diverts water from an artificial body of water known as Clifton Court Forebay (Jt. App., pp. 90a, 91a).[6]

Clifton Court Forebay, in turn, is connected to the Delta by means of an intake structure that was installed in a levee of a Delta channel under a permit issued in 1967 by the Corps of Engineers pursuant to Section 10 of the Rivers and Harbors Act of 1899 (Jt. App., pp. 115a-119a; State Exh. 25; R127, 127A, 130, 131, 157-159). The terms of that permit reserve continuing jurisdiction to require removal or alteration of the intake structure or any obstructions caused by it, needed "to render navigation reasonably free, easy and unobstructed" (*Id.*, p. 117, para (f)).

The evidence in this case does not show that the SWP diversion of waters from the Delta Pumping Plant impedes present or prospective navigation or commerce, or that it obstructs the navigable capacity of any of the waters of the United States.

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[5]The WRCB revised the SWP and CVP Delta diversion water rights permits in August 1978, by issuing Water Rights Decision 1485. Plaintiff, Sierra Club, participated in the lengthy administrative proceedings on which the WRCB based that decision. Although fourteen suits are now pending in the California Superior Court challenging that decision, the Sierra Club has not challenged it. (Judicial Council Coordination Proceeding No. 548; San Francisco County Superior Court.)

[6]The CVP diverts water from the Delta through a facility known as the Tracy Pumping Plant that is also located outside of navigable waters. Although that plant is located in close proximity to the State's Delta Pumping Plant, it does not divert water from the State's Clifton Court Forebay.

PROCEEDINGS BELOW.

Plaintiffs filed this action in March 1971, to enjoin DWR and WPRS from diverting water from the SWP's Delta Pumping Plant and the CVP's Tracy Pumping Plant until the Corps of Engineers had issued operating permits for those diversions. Plaintiffs also sought to enjoin the Corps from granting that approval until it receives and considers reports prepared under the Fish and Wildlife Coordination Act (16 U.S.C. §§ 662 and 663) and the National Environmental Policy Act (NEPA) (42 U.S.C. §§ 4331 and 4332).

The District Court denied motions by the federal and State defendants for dismissal, and subsequently allowed petitioners to intervene as defendants in May 1974. The District Court approved an Agreed Pre-Trial Order on June 10, 1974 that, among other things, bifurcated the trial into two phases. That Order limited Phase One to a determination of plaintiffs' entitlement to relief; and provided that if the Court determined that plaintiffs are entitled to relief, a Phase Two trial would be held to determine what form that relief should take. The Phase One trial was held in June 1974, with the court rendering its opinion that plaintiffs were entitled to some relief, on July 28, 1975 (Ptn. App., pp. 63 to 129).

The District Court ruled that a private cause of action exists to enforce Section 10 of the 1899 Act (Ptn. App., pp. 72-80), and that plaintiffs had standing to sue. It concluded that the SWP and CVP diversions of water from the Delta obstructed navigable capacity, and enjoined defendants to obtain operating permits from the Corps of Engineers under Section 10 of the 1899 Act (Ptn. App., pp. 80-93, 127-128). The District Court also ruled that the Section 10 permits which the Corps had previously issued to DWR and WPRS did not cover either the SWP or the CVP diversion operations (Ptn. App., pp. 93-99). In addition, it dismissed the Fish and Wildlife Coordination Act issues on the basis that there is no private right of action to enforce that Act (Ptn. App., pp. 104-108).

The District Court ordered DWR and WPRS to obtain operating permits for their respective water diversions from the Corps under Section 10 of the 1899 Act. It also ordered the Corps to prepare an environmental impact statement (EIS) under NEPA before issuing those permits. The District Court issued an Interlocutory Order Granting Injunctive Relief on December 18, 1975 (Jt. App., pp. 122a-124a). All the defendants, including petitioners, appealed to the Ninth Circuit Court of Appeals.

The Circuit Court affirmed the existence of a private right of action under Section 10 of the 1899 Act (Ptn. App., pp. 11-22), but dismissed one of the plaintiffs, Friends of the Earth, for lack of standing (Ptn. App., pp. 25-26). It also affirmed that DWR must obtain operating permits from the Corps under Section 10 of the 1899 Act, in order to continue to divert Delta water through the SWP Delta Pumping Plant, unless otherwise exempted by Corps' regulations (Ptn. App., pp. 26-39). In addition, the opinion implied that the Corps can control the environmental impact of those diversions even if they do not affect navigation in any substantial way (Ptn. App., pp. 54-55, n. 39).

However, the Circuit Court reversed the District Court with respect to operation of the federal CVP Tracy Pumping Plant (Ptn. App., pp. 40-49). It ruled that Congress had impliedly approved that operation and had thus exempted it from any requirement of obtaining operating permits from the Corps under the 1899 Act.

SUMMARY OF ARGUMENT.

The Circuit Court improperly extends the 1899 Rivers and Harbors Act on the basis of three significant errors:

First, it improperly implies a private right of action to enforce that Act. It reaches that conclusion by failing to apply the now well-established rule that in ascertaining whether a private right of enforcement of a federal statute exists, primary emphasis must be given to Congressional

intent. Instead, the Circuit Court found that the usual statutory interpretation standards did not apply to the 1899 Act and decided that a private right of action should be inferred because the Court felt that such a right was necessary to protect private parties who suffer special injuries. (Ptn. App., p. 19). The emphasis on "utility" rather than on what Congress intended led the Circuit Court to the erroneous conclusion that private parties may sue to enforce the 1899 Act.

Second, the Circuit Court opinion vitiates important congressional policy by expanding Section 10 of the 1899 Act beyond its original purpose, into matters traditionally relegated to State water rights law. In approving this expansion of federal law, the Circuit Court's opinion rejects a long-standing congressional policy established in over three dozen federal statutes and recognized by this Court. That policy consists of the important principle in federal-state relations, of deferring to State water rights law wherever feasible. It is particularly applicable where, as here, federal control would duplicate, and in effect preempt, an existing state regulatory program.

The Circuit Court bases its expansion of Section 10 on a strained interpretation of that section, and relies on previous cases that dealt with matters that are not traditionally relegated to state law. Furthermore, each of those cases involved either unreasonable burdens on navigation or physical changes to the channel of navigable waters. Neither factor is present in this action. Indeed, the record does not support a conclusion that the challenged water supply diversions obstruct the navigable capacity of the waters of the United States.

Third, even if the challenged water supply diversions should fall within the regulatory ambit of Section 10, the Circuit Court's opinion refuses to recognize that the explicit terms of the Section 10 permit that the United States issued

to the State prior to the filing of this action are sufficiently broad to protect the federal navigation servitude.

ARGUMENT.

I.

THE CIRCUIT COURT OPINION IMPROPERLY IMPLIES A PRIVATE RIGHT OF ACTION TO ENFORCE SECTION 10 OF THE 1899 ACT.

A. Introduction.

The question of whether a particular federal statute may be enforced by private individuals or groups has been the subject of several important decisions of this Court over the past six or seven years. The opinions in *National Railroad Passengers Corp. v. National Association of Railroad Passengers* (the "*Amtrak* case"), 414 U.S. 453, 94 S.Ct. 690 (1974); *SIPC v. Barbour*, 421 U.S. 412, 95 S.Ct. 1733 (1975); *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080 (1975); *Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 99 S.Ct. 2479 (1979); and *Transamerica Mortgage Advisors Inc. (TAMA) v. Lewis*, 444 U.S. 11, 100 S.Ct. 242 (1979), have established an analytical procedure which must be followed to ascertain whether Congress, in passing a statute, intended to create a private right to enforce its prohibitions.

Cort v. Ash is the most important of the earlier decisions as it instructed the lower courts to utilize a four-part test to determine a private right of action issue. The elements of the test are: (1) Is the plaintiff one of the class for whose especial benefit the statute was enacted; (2) Is there any indication of legislative intent, explicit or implicit, either to create a private remedy or to deny one; (3) Is it consistent with the underlying purpose of the legislation to imply a private remedy; and (4) Is the cause of action one traditionally relegated to state law, so it would be inappropriate

to infer a cause of action based solely on federal law. *Cort v. Ash,* 422 U.S. at 78, 95 S.Ct. at 2088.

However, it is the later cases, those decided in 1979, which are most important to the arguments which follow. The decisions in the *Cannon, Touche Ross,* and *TAMA* cases, *supra*, have clarified and refined the *Cort v. Ash* tests and emphasize that the "central inquiry" is to determine "whether Congress intended to create, either expressly or by implication, a private cause of action." *Touche Ross v. Redington,* 442 U.S. at 575, 99 S.Ct. at 2489.

The Circuit Court opinion in this case has a striking omission. Although it was issued on October 31, 1979, it does not even mention, much less discuss, the *Cannon* and *Touche Ross* cases which had been decided by this Court in May and June of that same year. As a result, the Circuit Court failed to give the required emphasis to congressional intent and instead determined that a private right of action should be inferred as "necessary to protect private parties who suffer special injuries." (Ptn. App., p. 19)

This brief will attempt to fill the analytical void in the Circuit Court opinion. We will first describe the rules established by this Court's most recent cases for determining if a private right of action exists and will then apply those rules to the 1899 Act. This exercise, we believe, must lead to the conclusion that the 1899 Act does not create a private right of action, and that the Circuit Court's failure to follow this Court's guidance resulted in an erroneous decision.

B. The Primary Question to Be Examined Is Whether Congress Intended to Create a Private Right of Action.

Cort v. Ash, as noted above, established a four-part test to determine if a private right of enforcement has been created. But the law is now clear that the primary purpose of the test is to determine if *Congress* intended to create the private cause of action. The latest statement of this principle

is contained in *TAMA v. Lewis, supra*, decided by this Court last session. In discussing the Investment Advisors Act, Justice Stewart stated:

> The question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction. [Cites] While some opinions of the Court have placed considerable emphasis upon the desirability of implying private rights of action in order to provide remedies thought to effectuate the purposes of a given statute, *e.g., J. I. Case Co. v. Borak, supra,* what must ultimately be determined is whether Congress intended to create the private remedy asserted, as our recent decisions have made clear. [Cites] We accept this as the appropriate inquiry to be made in resolving the issues presented by the case before us. (444 U.S. at 15-16, 100 S.Ct. at 245)

1. Congressional Intent Tests.

Turning to the statutory construction and Congressional intent arguments, we begin, of course, with the language of the statute itself. *Touche Ross & Co. v. Redington,* 442 U.S. at 568, 99 S.Ct. at 2485. The recent cases have utilized three tests to determine Congressional intent. Two of the tests, a public duty test and an enforcement test, analyze statutory language. The third test analyzes legislative history.

a. *BENEFIT TEST.*

Cannon v. University of Chicago, supra, establishes what may be referred to as a "benefit" test. That decision first distinguished statutes which refer to a special class to be benefited from statutes enacted for protection of the general public (441 U.S. at 689, 99 S.Ct. at 1953-4) and then continued:

> There would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting [the statute under consideration] with an unmistakable focus on the benefited class, had written it simply as a ban on discriminatory conduct by recip-

> ients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices. (441 U.S. at 690-693, 99 S.Ct. at 1954-55)

Footnote 13 of the *Cannon* opinion is particularly helpful in demonstrating how this distinction should be applied, as it contrasts the type of language which can fairly lead to an inference that private rights of action were intended from those where the inference is not available. In that footnote the Court reiterated:

> Conversely, the Court has been especially reluctant to imply causes of action under statutes that create duties on the part of persons for the benefit of the public at large. (441 U.S. at 692, 99 S.Ct. at 1955)

This, then, is the first test for interpreting the statutory language: Are the duty creating sections designed to protect specific individuals and groups or the general public? If the general public is the primary beneficiary, the Court should hesitate to infer Congressional intent to create a private right of action in the absence of other positive contrary evidence.

b. *ENFORCEMENT LANGUAGE TEST.*

The Second approach to analyzing the statutory language examines the enforcement provisions to determine if they include or exclude private individuals or groups. This approach was articulated in the *Amtrak* case as follows:

> A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Worsted Mills v. United States*, 278 U.S. 282, 289, 49 S.Ct. 129, 132, 73 L.Ed. 379 (1929). This principle of statutory construction reflects an ancient maxim — *expressio unius est exclusio alterius*. Since the Act creates a public cause of action for the enforcement of its provisions and a private cause of action only under very limited circumstances, this maxim

> would clearly compel the conclusion that the remedies created in § 307(a) are the exclusive means to enforce the duties and obligations imposed by the Act. (414 U.S. at 458, 94 S.Ct. at 693)

This concept has been regularly applied in the private right of action cases being discussed herein, and was most recently stated in *TAMA v. Lewis* as follows:

> [I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." [Cites] Congress expressly provided both judicial and administrative means for enforcing compliance with § 206 [of the Investment Advisors Act]. First, under § 217 willful violations of the Act are criminal offenses, punishable by fine or imprisonment, or both. Second, § 209 authorizes the Commission to bring civil actions in federal courts to enjoin compliance with the Act, including, of course, § 206. Third, the Commission is authorized by § 203 to impose various administrative sanctions on persons who violate the Act, including § 206. *In view of these express provisions for enforcing the duties imposed by § 206, it is highly improbable that "Congress absentmindedly forgot to mention an intended private action." Cannon v. University of Chicago,* .... U.S., at .... , 99 S.Ct., at 1981 (POWELL, J., dissenting). (444 U.S. at 19-20, 100 S.Ct. at 247; emphasis added)

This, then is the second test for interpreting statutory language: If the enforcement sections create specific methods of enforcement, the court should treat these methods as exclusive in the absence of other positive contrary evidence.

c. *LEGISLATIVE HISTORY TEST.*

In stating the two rules discussed above, the phrase "in the absence of other positive contrary evidence" has been included each time. This caveat has been added because the cases clearly hold that "even settled rules of statutory con-

struction could yield, of course, to *persuasive* evidence of a contrary legislative intent." *TAMA v. Lewis*, 444 U.S. at 20, 100 S.Ct. at 247 (emphasis added); also see the *Amtrak* case, 414 U.S. at 458, 94 S.Ct. at 693. Therefore, all of the cases review the legislative history of the act in question. In reviewing legislative history, however, it is important to keep in mind the kind of evidence which is necessary to overcome the interpretation flowing from the language of the statute itself. The word "persuasive", emphasized in the quote above militates against arguments that a private action may be inferred simply because the legislative history is silent on the subject.

In the *Touche Ross* case, the respondents argued that because Congress did not expressly deny a private cause of action, the Court should infer one. This Court replied:

> But implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best. [cite] And where, as here, the plain language of the provision weighs against implication of a private remedy, the fact that there is no suggestion whatsoever in the legislative history that [the statute in question] may give rise to suits for damages reinforces our decision not to find such a right of action implicit within the section. (442 U.S. at 571, 99 S.Ct. at 2486-87)

This, then, is the third test for determining the meaning of the statutory language: If the plain language of the law weighs against a private right of action, positive contrary legislative history is necessary to overcome this presumption. Congressional silence on the issue is insufficient.

2. A Utility Test May Not Be Used to Overcome Clear Evidence of Congressional Intent.

The concepts discussed above are the primary means recently established by this Court for determining whether Congress intended to create a private right of action. Before applying the concepts to the 1899 Act, however, one other judicial clarification of the four-part test established by *Cort*

v. Ash resulting from the opinions in *Touche Ross v. Redington* and *TAMA v. Lewis* must be considered.

Under that clarification, clear evidence that Congress did not intend to create a private right of action is not negated by an argument that a private right of action would be "useful" to enforcement of the statute in question. Numerous lower courts read *Cort v. Ash* as authorizing the creation of a private right of action in the absence of any evidence that Congress intended to preclude such an action if the private action would be "useful" or "necessary" to effectuate the purpose of the statute. This Court has now clearly ruled that such an approach constitutes error.

In *Touche Ross v. Redington,* this Court stated:

> SIPC and the Trustee urge, and the Court of Appeals agreed, that the analysis should not stop here. Relying on the factors set forth in *Cort v. Ash,* 422 U.S., at 78, 95 S.Ct., at 2088, they assert that we also must consider whether an implied private remedy is necessary to "effectuate the purpose of the section" and whether the cause of action is one traditionally relegated to state law. SIPC and the Trustee contend that implication of a private remedy is essential to the goals of § 17(a) and that enforcement of § 17(a) is properly a matter of federal, not state, concern. . . . We need not reach the merits of the arguments concerning the "necessity" of implying a private remedy and the proper forum for enforcement of the rights asserted by SIPC and the Trustee, for we believe such inquiries have little relevance to the decision of this case. It is true that in *Cort v. Ash, supra,* the Court set forth four factors that it considered "relevant" in determining whether a private remedy is implicit in a statute not expressly providing one. But the Court did not decide that each of these factors is entitled to equal weight. The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action. Indeed, the first three factors discussed in *Cort*—the language and focus of the statute, its legislative history, and its purpose, see 422 U.S., at 78, 95 S.Ct., at 2088—are ones traditionally relied

> upon in determining legislative intent. Here, the statute by its terms grants no private rights to any identifiable class and proscribes no conduct as unlawful. And the parties as well as the Court of Appeals agree that the legislative history of the 1934 Act simply does not speak to the issue of private remedies under § 17(a). At least in such a case as this, the inquiry ends there: The question whether Congress, either expressly or by implication, intended to create a private right of action, has been definitely answered in the negative. (442 U.S. at 575-76, 99 S.Ct., at 2489)

Last term, in the *TAMA* case, this Court, once again, rejected the notion that utility can create a private right when there is no evidence that Congress intended to create the right, stating:

> [T]he mere fact that the statute was designed to protect advisers' clients does not require the implication of a private cause of action for damages on their behalf. [Cites] The dispositive question remains whether Congress intended to create any such remedy. Having answered that question in the negative, our inquiry is at an end. (444 U.S., at 24, 100 S.Ct. at 249)

3. Summary.

What is evident from the cases discussed above is that this Court over the past six or seven years has been developing an analytic system to ascertain if federal statutes create private causes of action. *Cort v. Ash* was the first attempt to articulate a usable test. However, the lower courts applied the *Cort v. Ash* test too mechanically, not recognizing that its primary purpose was to ascertain legislative intent.[7] The subsequent cases have stressed this aspect of the analysis and have established that *Cort v. Ash* cannot be used to create a private action based on utility or necessity in the absence of any evidence that Congress intended to create

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[7]See Justice Powell's dissent in *Cannon v. University of Chicago*, 441 U.S. at 730, 99 S.Ct. at 1974 ff and his concurrence in *TAMA v. Lewis*, 444 at 25, 100 S.Ct. at 249.

such a right. The next portion of this brief will apply the analysis set forth above to the 1899 Act and will show that the Ninth Circuit opinion, in spite of the fact that it was issued after this Court's decisions in *Cannon* and *Touche Ross*, ignored these cases and mechanically applied the *Cort v. Ash* test in a manner which led to an erroneous conclusion.

C. Congress Did Not Intend to Create Private Rights to Enforce the 1899 Act.

1. Neither the Act's Enforcement Language nor Its Duty Creating Language Can Be Interpreted as Providing a Private Right of Action.

There are three enforcement provisions in the 1899 Act: Section 12 (33 U.S.C. § 406), Section 16 (33 U.S.C. § 411) and Section 17 (33 U.S.C. § 413). Section 16 is not relevant to the discussion which follows because this case only involves alleged violations of Section 10 of the Act. (33 U.S.C. § 403, Ptn. App., pp. 1, 2.) Section 16 only applies to violations of Sections 13, 14 and 15 of the 1899 Act. Therefore, the key enforcement language is found in Sections 12 and 17. These sections, as codified in 33 U.S.C., are set forth in the Appendix to this brief. *They specifically state that the Attorney General and the Department of Justice shall enforce the 1899 Act.*

As discussed in the previous section of this brief, such a specific delegation of enforcement powers to one organization uniformly has been held to imply that no other means of enforcement was intended, *SIPC v. Barbour, supra*, 421 U.S. at 419 95 S.Ct. at 1738 (1975); *Amtrak, supra*, 414 U.S. at 458, 94 S.Ct. at 693; *TAMA v. Lewis, supra*, 444 U.S. at 20, 100 S.Ct. at 247. Hence, the analysis of the 1899 Act begins with presumption that private rights of action were *not* intended.

It is however, the *Cannon* case which is most instructive when analyzing the 1899 Act. As discussed earlier, *Cannon* focused on the "right-or-duty-creating language" of the

statute and articulated a benefit test. It distinguished laws that confer a benefit directly on a class of persons from those that create duties for the benefit of the public at large (441 U.S. at 690-93, 99 S.Ct. at 1954-5; see, particularly, footnote 13). In the latter instance, the Court noted that it has been reluctant to imply private causes of action.

This dichotomy is especially relevant to the 1899 Act as the *Cannon* opinion, in footnote 13, singled out the 1899 Act as an example of a statute which creates a duty in favor of the public at large. The conclusion that the 1899 Act is a public benefit statute is supported by the analysis contained in footnote 13, which utilized the language of the statutes involved in a number of cases, including *Piper v. Chris-Craft Industries*, 430 U.S. 1, 97 S.Ct. 926 (1977), *Cort v. Ash, supra,* and *Amtrak, supra,* as examples of statutes designed to protect the general public. In each of those cases, the statute, without reference to particular individuals or groups, generally proscribed conduct as unlawful or prohibited when it was inconsistent with the statutory policy.

The language of Sections 9 and 10 of the 1899 Act is identical in concept to the statutes discussed in footnote 13 of the *Cannon* case. Section 9 makes it unlawful to construct facilities in navigable waterways until the plans are approved by the Chief of Engineers and the Secretary of the Army. Section 10 states that the creation of any obstruction not authorized by Congress, or in certain cases by the Chief of Engineers and the Secretary of the Army, is "prohibited" or "unlawful." There is no language in the sections directed to any particular persons or groups. In the face of the similarity between the 1899 Act and the statutes discussed in footnote 13, there is little wonder that the *Cannon* opinion chose to highlight the 1899 Act as a law designed to protect the public at large.

2. The Legislative History of the 1899 Act Supports the Conclusion That No Private Right of Action Was Intended.

The language of the 1899 Act itself, using both the enforcement and the public duty tests recently adopted by this Court, weighs heavily against the implication of a private

right of action. the legislature history of the Act supports this conclusion.

No party to this litigation has ever pointed to any history indicating that Congress intended to create a private right of action. Therefore, this case falls within the guidelines established by the *Touche Ross* decision, described above. When the plain language of a statute weighs against implication of a private remedy, the lack of legislative history to countervail this interpretation should reinforce the conclusion that the remedy does not exist.

In this case, however, there is more than silence. There is one relevant piece of legislative history which supports the conclusion that Congress did not intend to create a private right of action. To fully understand this history, some background on the 1899 Act is necessary.

Justice Harlan's dissent in *United States v. Republic Steel Corporation*, 362 U.S. 482, 499-504 80 S.Ct. 884, 894-97 (1960), contains an excellent summary of the legislative history of the 1899 Act. It is there pointed out that the provisions of the 1899 Act dealing with obstructions derive ultimately from a proposal transmitted to Congress by the Secretary of War in 1877. Numerous bills were introduced and began passing through Congress. However, it was not until 1890 that the comprehensive statute was enacted. In 1887, during the 50th Congress, 1st Session, S. 27 was the navigable waters bill. At that time what ultimately became Section 10 of the 1899 Act was Section 2 of S. 27 and, as amended, read as follows:

> Sec. 2. That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, wier, breakwater, bulkhead, jetty, or other structure outside established harbor lines without the permission of the Secretary of War in any port, roadstead, haven, harbor, navigable river, or other waters of the United States or in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters; and it shall not be lawful hereafter to commence the construction of any bridge,

> bridge-draw, bridge piers and abutments, causeway, or other works over or in any port, road, roadstead, haven, harbor, navigable river, or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge have been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of the channel of said navigable waters of the United States, unless approved and authorized by the Secretary of War.

As can be seen, the last phrase of Section 2 of S. 27 is very similar to Section 10 of the 1899 Act.

On March 22, 1888, the Senate considered S. 27, including Section 5 of the act, which until that date read as follows:

> Sec. 5. That every person, persons, or corporation offending against the provisions of this act shall, for each and every such offense, forfeit and pay a penalty of $250 besides such other sum as may be found in any action for the recovery of the penalty or penalties incurred under this act to be the expense of making good the damage incurred or of removing to a proper place the thing deposited in violation of this act, such penalties to be recoverable by and in the name of the United States of America, with costs, in any circuit or district court of the United States, at the suit of any district attorney of the United States, *or at the suit of any person,* by information to any district attorney in any district where or near to where the offense shall have been committed or the offender shall be. (Emphasis added.)

The Senate amended the procedural portion of this section by striking the quoted language beginning with "such penalties" through the end of the section, and substituting therefor the following language:

> such penalties to be recovered by action in the name of the United States in any district court within whose jurisdiction such offense shall be committed, said action to be instituted by the district attorney for such

> district at the instance of any person complaining. (19 Congressional Record 2338)

As can be seen, the enforcement section which was directed to Section 2 was amended to eliminate the language "or at the suit of any person." There could only be one reason for this amendment, to clarify the fact that enforcement powers were limited to the district attorneys of the United States.

S. 27 was not enacted; but in 1890, language nearly identical to Section 2 of S. 27 was enacted, and ultimately became Section 10 of the 1899 Act (Act of September 19, 1890, c. 907, §§ 7-11, 26 Stat. 954-5). Even though the enforcement language of Section 5 of S. 27 was broadened to include injunctive relief, the language authorizing private enforcement was not reinserted.

The Ninth Circuit opinion recognized the existence of this history, but avoided its import as follows:

> A close reading of the amendment, however, discloses that the Senate was addressing the question whether a private party could enforce the penal provisions of the legislation . . . The amendment does not indicate a legislative intent to preclude other actions under the 1899 Act. (Ptn. App., p. 15, fn. 9)

Such a narrow reading of legislative history is contrary to the reasoning of both the *Touche Ross* and *TAMA* cases. In those cases, this Court pointed out portions of the laws in question where Congress had expressly provided for private remedies and compared them to sections where Congress had been silent on the issue, *Touche Ross v. Redington,* 442 U.S. at 569-82, 99 S.Ct. at 2487; *TAMA v. Lewis,* 444 U.S. at 20-21, 100 S.Ct. at 247-8. Then the opinions continued:

> Obviously, then, when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly. (*Touche Ross v. Redington,* 442 U.S. at 572, 99 S.Ct. at 2487; *TAMA v. Lewis,* 444 U.S. at 21, 100 S.Ct. at 248)

This rationale is exactly why the legislative history of the 1899 Act is important. Even in 1899 Congress knew how to create a private right of action, and did so expressly. Further, Congress knew how to delete those express provisions and did so in 1887. Applying the words of the *TAMA* opinion to the 1899 Act: "What evidence of intent exists in this case, circumstantial though it may be, weighs against the implication of a private right of action. . . ." (444 U.S. at 20, 100 S.Ct. at 247.)

D. The 1899 Act Is Not Exempt From the Analysis Set Forth in This Brief.

As can be seen from the discussion above, all of the techniques for ascertaining legislative intent lead to the conclusion that Congress did not intend to create a private right of action. In spite of this, the Circuit Court opinion concluded that a private right of action should be inferred as "necessary to protect private parties who suffer special injuries." (Ptn. App., p. 19).

In relying on this "utility" analysis, the Circuit Court erred. It ignored the *Touche Ross* admonition that the inquiry is to end when it has been determined that Congress did not intend to create a private right of action. (442 U.S. at 576, 99 S.Ct. at 2489) Instead, the Circuit Court continued and applied a "utility" test by considering its own notion of what would be desirable. It undertook an exercise in judicial legislation.

The Circuit Court's error appears to have resulted from a combination of factors. First, that Court seems to have interpreted *Cort v. Ash* in the manner described in Justice Powell's dissent in the *Cannon* case, as inviting independent judicial determinations of what the goals of a law should be and how best they can be advanced (441 U.S. at 740-41, 99 S.Ct. at 1980-81). As noted previously, however, the *Touche Ross* and *TAMA* opinions make it clear that such a reading of *Cort v. Ash* is in error.

Second, the Circuit Court did not terminate its analysis with the ascertainment of Congressional intent, apparently because it was unaware of the *Cannon* and *Touche Ross* cases. Therefore, the Circuit Court opinion did not carry out the analytical procedure established by those cases and, as a result, reached the wrong conclusion on Congressional intent.

Third, the Circuit Court did not utilize the statutory interpretation test set forth in *Amtrak* and *SIPC v. Barbour* because it believed that this Court's decision in *Wyandotte Transportation Co. v. United States*, 389 U.S. 191, 88 S.Ct. 379 (1967) exempted the 1899 Act from such scrutiny. The Ninth Circuit's opinion, referring to *Amtrak, Barbour* and the enforcement language of the 1899 Act concluded:

> Normally, these express statutory provisions would imply that no other means of enforcement are intended, with only clear contrary evidence of a legislative intent to rebut the presumption. [Cites] This principle, however, does not apply to the Rivers and Harbors Act of 1899 (Pet. App., p. 16)

The *Wyandotte* case, however, is simply not precedent for a private right of action issue. *The United States was the plaintiff in Wyandotte*, and the Court did not even address the issue of private parties' right to suit. In *Wyandotte*, the defendant contended that a sunken vessel could be abandoned, thereby relieving its owner of the duty of raising it and removing it as a navigational obstruction. Defendant further claimed that if the United States removed the vessel, the United States could only recover its costs by selling the vessel and its cargo, but could not obtain a personal judgment against its owner if the removal costs exceeded the salvage value. It was in this context, where the Government had spent several million dollars raising a dangerous barge load of liquid chlorine from the bottom of the Mississippi River, that this Court said:

> But our reading of the Act does not lead us to the conclusion that Congress must have intended the stat-

> utory remedies and procedures to be exclusive of all others. There is no indication anywhere else — in the legislative history of the Act, in the predecessor statutes, or in nonstatutory law — that Congress might have intended that a party who negligently sinks a vessel should be shielded from personal responsibility. We, therefore, hold that the remedies and procedures specified by the Act for the enforcement of § 15 were not intended to be exclusive. Applying the principles of our decision in *Republic Steel,* we conclude that other remedies, including those here sought, are available to the Government. (389 U.S. at 200-201, 88 S.Ct. at 385.)

To use this language to render the usual rules for ascertaining the existence or nonexistence of a private right of action inapplicable to the 1899 Act extends the *Wyandotte* case far beyond its holding. It ignores the fact that the objective of that case was to protect the *United States'* right to fully protect navigable waterways and the fact that the language quoted above ends with the phrase "other remedies . . . are available to the Government." *Id.* It further ignores *Wyandotte's* later statement that "a principal beneficiary of the Act, if not the principal beneficiary, is the government itself." *Id.* It is one thing to hold that the principal beneficiary of the Act (The United States) should have broad remedies available to protect the public waterways of this nation. It is a far different thing to use such a holding to rule that the 1899 Act is exempt from the normal rules of statutory interpretation. Yet, it was just such a conclusion which led the Court of Appeals to reject this Court's rulings in *Amtrak* and *SIPC v. Barbour.*

Finally, the Circuit Court apparently believed that this Court ruled *sub silentio,* in *State of Wisconsin v. State of Illinois,* 278 U.S. 367, 49 S.Ct. 163 (1929) that others beside the federal government may enforce the 1899 Act (Pet. App., p. 14, fn. 8). In footnote 8 of its opinion (Ptn. App., p. 14), the Circuit Court states that plaintiffs in *Wisconsin v. Illinois* alleged a violation of the 1899 Act in their

complaint and sought an injunction against diversions from Lake Michigan. The footnote continues by deciding that since the Supreme Court considered the case on its merits, it must have found that a private right of enforcement exists. This statement totally overlooks the difference between the plaintiffs' jurisdictional pleadings in *Wisconsin v. Illinois* and the basis on which the court accepted jurisdiction.

It is obvious from reading the *Wisconsin v. Illinois* opinion that plaintiffs pleaded several causes of action, one of which may very well have been violation of the 1899 Act. But it is equally obvious that the Supreme Court may have considered plaintiffs' claims on the basis of allegations which did not involve an attempt by plaintiffs to privately enforce the Act. The Court stated:

> The controversies have taken a very wide range. The exact issue is whether the State of Illinois and the Sanitary District of Chicago by diverting 8,500 cubic feet from the waters of Lake Michigan have so injured the riparian and other rights of the complainant states bordering the Great Lakes and connecting streams by lowering their levels as to justify an injunction to stop this diversion and thus restore normal levels. Defendants assert that such a diversion is the result of congressional action in the regulation of interstate commerce, that the injury, if any, resulting is *damnum absque injuria* to the complaining states. (278 U.S. at 410, 49 S.Ct. at 169)

Given this statement by the Court, its decision to decide the case on the merits cannot be equated with a *sub silentio* holding that the 1899 Act could be privately enforced. An independent jurisdictional ground — damage to riparian and other rights — existed, and the Court's decision to consider the case on the merits could just as easily have been based on that ground. The opinion's careful attention to the 1899 Act does not alter this possibility. The need to examine the 1899 Act did not arise from any attempt by plaintiffs to enforce the 1899 Act, but rather from defendants' attempt to use the Act as a shield from liability.

None of the four reasons discussed above provides a basis for the Circuit Court's decision to exempt the 1899 Act from normal scrutiny under the recent cases and to extend its inquiry beyond Congressional intent into the area of the utility or the need for a private right of action. Yet, that is precisely what was done in this case; and reversal is, therefore, required.

E. The Plaintiffs' Claims Are in an Area Traditionally Relegated to State Law.

Because the recent cases have emphasized the importance of determining Congressional intent, this brief has not yet discussed one factor of the *Cort v. Ash* test. That factor is whether the action is traditionally relegated to state law in an area basically the concern of the states. (422 U.S. at 78, 95 S.Ct. at 2088) This test also provides substantial support to the argument that Congress did not intend to create a private right of action under the facts of this case and to a policy argument in favor of relegating this case to the California State courts.

Plaintiffs seek by this action to restrict water supply diversions which are regulated under State water law that represents an exercise of historical State Police power. It is clear from a reading of the complaint that plaintiffs are not interested in interferences with boating, shipping, commerce, and similar matters which have traditionally been the focus of the 1899 Act. Instead, they are attempting to force the Corps of Engineers to utilize their regulatory authority over navigation, in order to impose water quality and fish and wildlife protection conditions on water diversion activities of the State of California. (Jt. App., pp. 22a-48a; Ptn. App., p. 69)

However, the State of California regulates the water diversions that plaintiffs challenge, under State water rights appropriations laws that are based on the exercise of its police powers (*Joslin v. Marin Mun. Water Dist.*, 67 Cal.2d

132, 144 (1967)), as incorporated in Article 10, Section 2 of its Constitution. (See *People v. Forni*, 54 Cal.App.2d 743, 749-50 (1976).) The United States has traditionally relegated that control to the states for more than a century as described in a subsequent portion of this brief *(Jennison v. Kirk*, 98 U.S. 453 (1879); *California v. United States, supra).*

It is abundantly clear, therefore, that the appropriation of waters within California's borders is an activity that is basically the concern of that State, and that the control of that activity has been traditionally relegated to the State. This creates an additional strong reason why, on the facts of this case, the Court of Appeals should not have found a private right of action to enforce Section 10 of the 1899 Act.

II.

THE CIRCUIT COURT OPINION EXPANDS THE SCOPE OF SECTION 10 BEYOND THAT INTENDED BY CONGRESS.

The Circuit Court opinion vitiates important Congressional policy by extending the 1899 Act beyond its original purpose, into matters traditionally relegated to State law. That extension is based on a strained technical interpretation of Section 10 of the 1899 Act that does not further the purposes of the Act. It would significantly expand the manner in which the Government has administered the Act over the past 80 years. It would require the Corps of Engineers to act as a national water rights regulator independently of either navigation burdens or State water rights law.

By thus subordinating state water rights law to federal control, the Circuit Court opinion would preempt an important principle of federal-state relations. Congress has proclaimed that principle in dozens of statutes, and this Court has recently reaffirmed it in *California v. United States, supra* and *United States v. New Mexico, supra*. The principle, in short, is one of deference to state water rights

law in the absence of some tangible inconsistency with a clear federal interest. The Circuit Court's subordination of this traditional state concern is based on a defective application of federal statutes other than the 1899 Act.

California has adopted comprehensive water rights allocation laws (California Water Code Divisions 1 and 2) that incorporate comprehensive environmental (Cal. Public Resources Code § 21000, *et seq.*) and water quality (Cal. Water Code § 13000, *et seq.*) protection statutes. It applies those statutes to all water diversions within the state, including the State Water Project diversions that this action challenges. The Circuit Court opinion would allow the Federal Government to veto all basic decisions made by the State of California involving its totally intrastate water project, even if no federal navigational interests were affected. That would improperly distort the intent of the 1899 Act and seriously undermine the State's control over its water resources.

The Circuit Court's expansion of the 1899 Act at the expense of California's water rights and environmental protection law, is premised on two other serious defects, First, it relies on a strained technical interpretation of the plain language of the first clause of Section 10 of the 1899 Act, which unnecessarily expands the concept of obstructions to navigable capacity. Second it, in effect, strikes one of the key words of the third clause of that section, in order to include water supply diversion operations within the clause.

A. The Circuit Court Opinion Vitiates Important Congressional Policy.

The Circuit Court opinion incorporates Congressional policy from other federal statutes to justify its strained interpretation of Section 10. However, it refuses to incorporate more relevant, and indeed more current, Congressional policy established in numerous federal water resource statutes. As a result, the opinion circumvents the long-standing

Congressional policy of preserving state jurisdiction over water rights allocations.

It, therefore, vitiates much of that policy, because most of the nation's public water supplies are diverted from navigable surface streams.[8] The opinion would in effect destroy the State's control over these critical resources, as well as Congressional protection of that control. It reaches that result by holding that any technical alteration of navigable waters triggers general federal regulatory jurisdiction, even if the alteration does not burden present or prospective navigation.

The Circuit Court's refusal to incorporate the well-established Congressional policy of deferring to state water rights law constitutes an implied repeal of the statutory provisions that declare that policy. That refusal is in sharp contrast with the principle established by the decisions of this Court of not favoring implied repeals. It is also inconsistent with the general principle established by this Court that the Federal Government should not preempt state regulatory power in the absence of persuasive reasons.

1. Congress Has Legislated a Clear Policy of Deferring to State Water Rights Laws.

In the 112 years between 1866 and 1978, Congress has adopted over three dozen statutes that establish a consistent and well-defined policy of recognizing state water rights laws, and of deferring to those laws in all respects not directly inconsistent with Congressional directives. Petitioners have identified the relevant provisions of 38 of those statutes (Ptn. App., pp. 131-151). The quoted statutes begin

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[8]Over 300 billion gallons of fresh water are diverted from the nation's surface streams each day. *The Nation's Water Resources 1975-2000: Second National Water Assessment by The U.S. Water Resources Council*, Volume 1 (1978), pp. 18 and 29. Currently, State and local agencies administer nearly all of those diversions, *The Nation's Water Resources: First Annual Assessment of the Water Resources Council* (1968), p. 5-1-1.

with the Act of July 26, 1866 (recognizing water rights established in the public domain under local authority) and continue through the Clean Water Act of 1977 (deferring to state authority to allocate waters and to water rights established under that state authority).

Those statutes cover a broad spectrum of water supply, water quality, and water rights adjudication matters, that have direct application to navigable waters. Indeed, Congress has continued to reassert its policy of deferring to State water rights law, in water resources legislation enacted after the District Court filed its opinion in this case (Ptn. App., pp. 148-151).

The State of California has described the development of state water rights laws at some length in its Brief on the Merits in No. 79-1252, and has admirably traced the development of the Congressional policy of deference to those laws. We, therefore, adopt that portion of the State's brief (State Brief, pp. 19-36).

2. The Circuit Court Opinion Rejects the Established Congressional Policy of Deference to State Water Rights Law.

The Circuit Court chose to reject the congressional policy of deference to state water rights law (Ptn. App., p. 33, n. 26). The basic thrust of the Court's action is to limit a state regulated water supply diversion authorized and administered under state water rights law. To reach this result, the Circuit Court had to rely on policy considerations in federal environmental statutes that are less relevant to this case than is the Congressional policy of deferring to state water rights law (*Id.*, pp. 24, 32).

More specifically, the Circuit Court relied on Fifth Circuit dredge and fill cases that expanded the scope of the 1899 Act to include environmental controls over those types of activities (*Zabel v. Tabb*, 430 F.2d 199, 208-214 (1970); *United States v. Moretti* (*Moretti I*), 478 F.2d 418, 429 (1973)). Dredge and fill activities are not activities tradi-

tionally relegated to state law, as are water supply diversions. None of the Fifth Circuit cases involved issues of federal-state water jurisdiction that are so central to this case. Consequently, the courts in those cases did not consider the Congressional policy of deferring to state water law.

Environmental policy considerations are, of course, relevant to those activities, and, indeed, to water diversion activities. But, as noted previously, California already imposes strict environmental controls on Delta water export operations, through its regulation of water diversion rights (Calif. Water Code §§ 1243, 1243.5, 1257 and 1258; *EDF v. East Bay MUD, supra*) and through its environmental quality act (Calif. Public Resources Code Section 21000, *et seq.*) There is, therefore, no reason to thrust the Corps of Engineers into the water diversion regulation business when federal navigational interests are absent simply to regulate environmental matters. But this is precisely what the Circuit Court's decision does.

Federal subordination of state water supply diversion controls would be particularly disruptive in this case. It would, in fact, undermine the institutional structure of California's multi-billion dollar State Water Project, which has been designed to provide essential public water supplies to two-thirds of the State's population over at least the next 55 years (Jt. App., pp. 99a-114a; State Exhibit 30, articles 2, 4, 45 and 31, *supra*). California's electorate and its Supreme Court have approved the project (Jt. App., p. 89a; *Metropolitan Water District v. Marquardt*, 59 Cal.2d 159 (1963); Joint Brief of Intervenors, District Court Docket Item 111).

If the United States, rather than the State, is allowed to regulate the SWP diversions, it will, as a practical matter, control the project. Federal control would directly undermine the Project's critical institutional mechanism, particularly the individual contracts that the state has made with petitioners and several other public water agencies through-

out the state for the delivery of specifically scheduled amounts of project water each year. Those contracts are based on state constitutional and statutory mandates that require full repayment of the state indebtedness incurred in constructing the project (*Joint Brief of Intervenors*, District Court Docket Item 111; note 4, *supra*).

Petitioners entered into their state water contracts with the understanding that state water law, rather than federal law, would control those diversions, as long as those diversions did not impair navigation. By allowing the U.S. Corps of Engineers to subordinate state laws in matters that extend beyond federal navigation requirements (Ptn. App., pp. 118-119), the Circuit Court opinion injects a major uncertainty into California's multi-billion dollar SWP, and, more specifically, into petitioners' respective water supplies.

That uncertainty is particularly disruptive because petitioners and scores of communities within their service areas have undertaken extensive financial and water supply responsibilities on the basis of the water delivery schedules set forth in the state water supply contracts (Jt. App., pp. 99a-112a). The Circuit Court opinion would transfer the basic authority over the Project's water delivery capability to a federal agency that has no responsibility for the State Water Project's operational or financial integrity. In addition, that agency can ignore the legal safeguards that petitioners have developed over the past twenty years in cooperation with the State's electorate, legislature, and judiciary to assure optimum use, reliable operation, responsible funding, and financial feasibility.

The Circuit Court's refusal to consider the well-defined Congressional policy of deferring to state water rights law is particularly insupportable in light of this Court's recent recognition of the history of Congressional intent in the field of federal-state jurisdiction over the allocation of waters, and its general deference to State water rights law, (*United*

States v. New Mexico, supra, 438 U.S. at 701-702, 98 S.Ct. at 3015; *California v. United States, supra,* 438 U.S. at 678-679, 98 S.Ct. at 3002-3003). Those two decisions clearly recognize that Congress considers water supply diversions as matters traditionally relegated to State law.

The Circuit Court opinion interprets *California v. United States* very narrowly. Indeed, it appears to limit that decision to "the context of federal *reclamation* projects". (Ptn. App., pp. 35-36.) That limitation manifests a serious misreading not only of *California v. United States,* but also of this Court's concurrent decision in *United States v. New Mexico*. The latter decision was not a Reclamation Act case, but it still recognized the same Congressional deference to State water law as did *California v. United States*. Furthermore, *California v. United States* itself cites a non-Reclamation Act statute, the McCarren Amendment, as "the most eloquent expression of the need to observe State water law." The McCarren Amendment subjects the United States to state court jurisdiction for general stream adjudication of water diversion rights (438 U.S. at 689, 98 S.Ct. at 3002. (Ptn. App., p. 140)).

Apparently, the Circuit Court also considers 37 other federal statutes deferring to State water law as essentially limited to reclamation projects (Ptn. App., pp. 33-36) and, therefore, inapplicable to a navigation statute. However, less than a third of those acts are Reclamation Act statutes. The relevant portions of those statutes are set forth on pages 131-151 of the Ptn. App., with asterisks identifying the Reclamation Act statutes.

3. The Circuit Court's Rejection of the Federal Policy Favoring State Water Rights Law Constitutes an Unfavored Implied Repeal.

The Circuit Court's rejection of the Congressional policy articulated in 38 federal statutes (Ptn. App., pp. 131-151) impliedly repeals a significant portion of that policy and, of course, partially repeals some of those statutes. For ex-

ample, Section 301(a) of the Water Supply Act of 1958 (Ptn. App., p. 145) states the following general policy applicable to all federal agencies:

> It is hereby declared to be the policy of the Congress to recognize the primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, industrial, and other purposes and that the Federal Government should participate and cooperate with States and local interests in developing such water supplies in connection with the construction, maintenance, and operation of Federal navigation, flood control, irrigation, or multiple purpose projects.

The Circuit Court opinion would impliedly repeal that statute, at least as it applies to navigable waters. It would transfer primary authority for regulating water supply diversions from navigable streams, to the Federal Government. Accordingly, it would preclude the states from exercising one of their primary responsibilities for developing navigable water supplies, namely the authority to allocate rights to the use of those supplies.

It is a cardinal principle of statutory construction that repeals by implication are not favored. As this Court stated in *United States v. Borden Co:*

> When there are two acts upon the same subject, the rule is to give effect to both if possible . . . The intention of the legislature to repeal 'must be clear and manifest . . .' There must be a positive repugnancy between the provisions of the new law, and those of the old. . . . (308 U.S. 188, 189, 60 S.Ct. 182, 188 (1939); See also *United States v. Batchelder,* 442 U.S. 114, 122, 99 S.Ct. 2198, 2203 (1929).)

There is, therefore, a judicial duty to give effect to both the old (1899 Act) and new (1958 Water Supply Act) statutes, absent a repugnancy between the statutes. (*United States v. Healey,* 160 U.S. 136, 146, 16 S.Ct. 247, 251 (1895); *United States v. Jackson,* 302 U.S. 628, 631, 58 S.Ct. 390, 392 (1938).)

4. The Circuit Court's Rejection of the Federal Policy Favoring State Water Rights Law Constitutes an Unfavored Preemption.

The Circuit Court's imposition of federal regulation over water supply diversions that do not burden future or prospective navigation would essentially preempt state water rights control of those diversions. The Circuit Court bases that preemption on the fact that the 1899 Act does not itself mention non-interference with state-authorized water supply diversion operations (Ptn. App. p. 36).

However, in analogous situations, involving other federal statutes, this Court has deferred to state law, where that deferral would not impair basic federal responsibilities, (*Linn v. United Plant Guard Workers,* 383 U.S. 53, 59-61, 86 S.Ct. 657, 661-662 (1966) (National Labor Relations Act, 29 U.S.C. § 141, *et seq.*); *Florida Lime and Avocado Growers,* 373 U.S. 132, 144, 83 S.Ct. 1210, 1218 (1963) (Federal Agricultural Adjustment Act, 7 U.S.C. § 601, *et seq.*)). This Court succinctly stated the underlying principle in *Florida Lime, etc., supra,* as follows:

> The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons — either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained. (373 U.S. at 142, 83 S.Ct. at 1217)

In applying this principle to analogous statutory interpretation issues involving the Labor Management Relations Act, this Court has also concluded:

> that the states need not yield jurisdiction "where the activity regulated was a merely peripheral concern of the Labor Management Relations Act . . . [o]r where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the states of the power to act." (*Linn, supra,* 383 U.S. at 59,

86 S.Ct. at 661, quoting *San Diego Unions v. Garmon*, 359 U.S. 236, 243-244; 79 S.Ct. 773, 779 (1959).)

This Court has not required an express statutory statement in federal statutes of noninterference with State law in order to limit federal preemption. Instead, it has refused to infer federal statutory preemption of state law without an unambiguous Congressional mandate to that effect, particularly where the state law represents, as it does here, an exercise of historic State police power (383 U.S. at 59, 86 S.Ct. at 611; 373 U.S. at 146, 83 S.Ct. at 1219).

In the present case, the continued deference to state water rights law does not stand as an obstacle to the accomplishment of the basic purposes and objectives of the 1899 Act, so long as federal regulation of water rights diversions is limited to cases involving unreasonable interference with present or prospective navigation (*United States v. Rio Grande, supra*). Indeed, State water rights laws have coexisted with federal regulation of navigation for the entire 80-year life of the 1899 Act, without any significant conflict between the two regulatory schemes.

Even more importantly, the plaintiffs have not presented any evidence of Congressional intent to preempt the field of water rights law. Instead, there is ample evidence to the contrary, that Congress in fact intends to recognize and protect State water rights jurisdiction over water supply diversions from navigable waters in the absence of any substantial impairment of established navigable capacity.

B. The Circuit Court's Opinion Relies on a Strained Technical Interpretation of Section 10 That Does Not Further the Purpose of the 1899 Act.

The Ninth Circuit's opinion stretches the plain meaning of Section 10 of the 1899 Act (Ptn. App., pp. 27-28, 39) and thereby expands its scope beyond its intended purpose, in a manner that preempts existing Congressional policy. There is no sound reason for the preemption in either the Act itself, or in this Court's previous decisions.

In making this assertion, petitioners are not insisting on the narrowest possible definition of navigable capacity as the Circuit Court opinion charges. (Ptn. App., p. 28, fn. 24.) Neither do we dispute that Congress possesses broad power to protect navigation, and to subordinate State law to implement that power, as the opinion suggests. (Ptn. App., p. 38.) However, in the area of water diversion law, Congress has tempered its exercise of power by deferring to State water law in the absence of direct inconsistency with federal statutes. (*California v. United States, supra.*) The plain language of the 1899 Act is not inconsistent with that deferral, and the Circuit Court should not stretch the Act in order to make it inconsistent.

Furthermore, the fact that the 1899 Act does not explicitly mention noninterference with State water law is not controlling, as the opinion also suggests. (Ptn. App., p. 36.) That suggestion ignores the decisions of this Court described above, in analogous situations that limit federal preemption of State laws and implied repeal of federal statutes.

1. The Purpose of the 1899 Act Is to Prevent Unreasonable Obstructions to Navigation.

Congress enacted Section 10 of the 1899 Act to regulate the creation of obstructions to navigation caused by altering the physical structures[9] that enclose the Nation's navigable waterways. Since common law did not regulate those obstructions, Congress had been forced to enact legislation to protect navigation, which at that time represented a major percentage of the Nation's transportation system (*Willamette Iron Bridge Co. v. Hatch,* 125 U.S. 1, 8 S.Ct. 811 (1888); *Hubbard v. Fort,* 188 Fed. 987 (1911). 32 Cong. Rec. 1350-51 (1899)). Subsequent case law has added to the types of activities originally covered by the Act, non-

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[9]The term "physical structures" refers both to natural or artificial features, such as banks, beds, channels, and levees which define the boundary of specific navigable waters.

structural operations which substantially interfere with the navigable capacity needed to support recognized navigation (*Sanitary Dist. of Chicago v. United States, supra*).

Congress has divided Section 10 into three clauses. The first is a general prohibition on the creation of any obstruction "to the navigable capacity of any of the waters of the United States," unless "affirmatively authorized by Congress." The second clause prohibits construction of certain types of structures in navigable water without authorization by the Secretary of the Army. The third clause similarly prohibits excavating, filling or altering various types of structures that enclose water bodies, including harbors, canals or channels that contain navigable water.

Although the first clause of Section 10 prohibits obstructions to the navigable capacity of any of the waters of the United States without affirmative congressional authorization, the decisions of this Court have imposed on that concept a criterion of reasonableness. Thus in *Wisconsin v. Illinois, supra,* this Court stated that:

> The true intent of the Act of Congress was that *unreasonable* obstructions to navigation and navigable capacity were to be prohibited. . . . (278 U.S. at 413, 49 S.Ct. at 170, emphasis added.)

The criterion of reasonableness involves both policy and factual considerations. Policy considerations should obviously include the congressional policy, described above, of deferring to state water rights law whenever reasonable. That policy should be a permanent consideration in determining whether an activity constitutes an obstruction to navigable capacity, particularly under the first clause of Section 10. It seems eminently reasonable that water supply diversions regulated under state water rights law should be presumed not to be an obstruction to navigable capacity, in the absence of a factual showing of unreasonable burden on, or destruction of, present or prospective navigation.

The reasonableness criterion also involves factual considerations, in determining whether an activity such as the SWP water supply diversion constitutes an obstruction to navigable capacity. As this Court has previously stated:

> The question always is one of fact, whether such appropriation substantially interferes with the navigable capacity within the limits where navigation is a recognized fact. (*United States v. Rio Grande Dam and Irrig. Co.*, 174 U.S. at 709, 19 S.Ct. at 777.)

Thus the criterion should include such factors as whether the activity would create substantial navigation burdens, present or prospective; or would cause hydraulic changes substantially greater than those that have occurred independently of the activity. In applying the reasonableness criterion to *de facto* water supply diversions regulated under state water laws, that same decision articulated the criterion in terms of whether the water supply activity would diminish the volume of water "to such an extent as to destroy its navigability" (*Id.*).

Consequently, water rights activities that do not fall within the second or third clauses of Section 10 should not fall within the regulatory ambit of the 1899 Act, absent an affirmative factual showing of unreasonable impairment of present or future navigation. The facts of this case certainly do not show an unreasonable actual or potential impairment of navigation. The only effects shown on navigable waters were the potential lowering,[10] at times, of water levels to varying degrees, and some flow reversals in channels that are naturally subject to flow reversals (Ptn. App., p. 27, n. 22; Jt. App., p. 95a).

Both effects are well within the amplitude of naturally occurring tidal variations. Mr. Hebert testified that the variations in water elevations caused by tidal action are between

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[10]Mr. Alfred Jones testified that Clifton Court Forebay allowed the State to operate the SWP Delta Pumping Plant "without incurring any level variations during low tides to the Delta" (R 98, lines 3-10).

three and three and one-half feet (Jt. Ptn., p. 212a), as compared to the maximum potential effect on water levels (caused by *both* the SWP Delta Pumping Plant and the Federal Tracy Pumping Plant) of one and one-half feet (Ptn. App., pp. 27, n. 22, 90).

Similarly, Mr. Hebert testified that flow reversals are inherent in the waters in question because they are "under the influence of the tidal variations at the Golden Gate" (Jt. App., p. 121a). The plaintiffs did not present any evidence controverting that testimony. Nor did they present any testimony that the variances caused any present or would cause any potential interference with navigation.

2. The Circuit Court Opinion Improperly Amends the Third Clause of Section 10.

The Circuit Court opinion, however, circumvents the reasonableness criterion of Section 10. It concludes that the SWP water diversions fall within the scope of the third clause of Section 10, and then *presumes* that that activity constitutes an obstruction to navigable capacity (Ptn. App., pp. 28, 39). Thus, the Circuit Court concludes that federal regulation attaches to nonstructural water supply activities that do not affect navigation in any meaningful way.

The opinion bases this conclusion on an interpretation of the third clause which eliminates the word "channel" from the statutory language. The limitation implicit in that word is readily apparent from the relevant portion of the third clause:

> . . . and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of . . . the *channel* of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same. (33 U.S.C. § 403, emphasis added.)

Previous decisions have applied the term "channel" in the context of the physical bed of a stream, bay or sound,

rather than to the waters which it encloses (*State of Alabama v. State of Georgia,* 64 U.S. 505, 513, 1859; *Yellowstone Pipe Line Co. v. Kuceynski,* 283 F.2d 415, 421 (9th CCA, 1960); *Village of Prairie DuRocher v. Schoening-Koenigsmark,* 248 Ill. 57, 59; 93 NE 425, 426 (1910); 93 C.J.S. Waters § 41).

Thus, modification of the "condition or capacity of the *channel*" of navigable water would require an alteration in the physical structure carrying the water. It does not encompass a change solely in the flow characteristics of the water carried by the channel. The Circuit Court opinion, however, assumes that Section 10 includes just that, and that the 1899 Act applies to every nonstructural modification of the water levels or other flow characteristic of a navigable stream. It makes that assumption independently of any effect on the physical structure through which the water flows, or on future or potential navigation (Ptn. App., pp. 39, 54).

The Circuit Court supports its generous interpretation of Section 10 by cases that involve either changes in a physical structure enclosing navigable waters, or substantial burdens on navigation. But those factors are not present in our case. The SWP diversions do not affect the channel of the Delta waterway from which they are taken. The levee gates through which those diversions are made were constructed pursuant to a Section 10 permit that was issued before this action was filed (Joint App., pp. 91a, 115a-118a). Furthermore, the State constructed those gates specifically to avoid changing the Delta channels (Ptn. App., p. 91, n. 31).[11]

a. *THE CHANGED CHANNEL CASES.*

Most of the cases on which the Court of Appeals relies involved situations where activities physically changed the structure of the bed underlying navigable waters (Ptn. App.,

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[11]The State also constructed as an artificial body of water, the Clifton Court Forebay to which the gates connect (Jt. App., p. 91a; Ptn. App., p. 50).

pp. 24, 31-33). Although these changes were not shown in every case to directly affect navigation, they easily fall within the plain language of the third clause of Section 10. For example, in *United States v. Republic Steel*, 362 U. S. 482, 80 S.Ct. 884 (1960), solid industrial wastes were deposited on the bed of a navigable channel so as to increase the height of that bed by four to nine feet. The consequent shoaling reduced channel depths below the 21-foot draft needed by vessels that normally used the channel, *Id.*, at 483.

The two *U.S. v. Moretti*, cases, *Moretti I*, 478 F.2d 418 (5th Cir. 1973) and *Moretti II*, 526 F.2d 1306 (5th Cir. 1976); *Weiszmann v. Corps of Engineers*, 526 F.2d 1302 (5th Cir. 1976); *U.S. v. Sexton Cove Estates, Inc.*, 526 F.2d 1293 (5th Cir. 1976); and *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970; cert. den. 401 U.S. 910 (1971)) were all cases where dredge and fill operations physically changed the bed underlying navigable waters. In *Moretti*, the defendant had deposited 400,000 cubic yards of earth into the channel bed, 526 F.2d at 1308; in *Weiszmann*, sediment had been deposited in a channel bed as a result of dredging a new canal, 526 F.2d at 1305; in *Sexton Cove*, defendant had constructed a new shoreline on a coastal sound, 526 F.2d at 1299; and in *Zabel*, eleven acres of tidelands were filled, 430 F.2d at 201.

The Circuit Court, in spite of the fact that each of the cases cited above involved physical alteration of a channel or shoreline, ignored that limitation and concluded that *Moretti I* established "beyond cavil that an alteration or modification of navigable waters is sufficient to trigger the permit requirements of Section 10," (Ptn. App., p. 32). The interpretation is particularly misplaced because *Moretti I* specifically limited its holding to "any *filling* of navigable waters" (478 F.2d at 429, n. 37; emphasis added).

The Circuit Court's reliance on *Hubbard v. Fort* (188 Fed. 987 (1911)) is similarly misplaced. That case also

involved a physical change of the bed underlying navigable waters (by the installation of an underwater pipeline). One aspect of that case, however, is of particular relevance. The court rejected federal preemption of a state law which prohibited the construction of the pipeline. (*Id.* at 989-92.) Although that factual situation differs from the factual situation in this case, *Hubbard* does indicate that in enacting Section 10, Congress did not intend to override all associated state interests. (*Id.* at 999.)

b. *NAVIGATION BURDEN CASES.*

The Circuit Court relied on two other types of cases for its expansive interpretation of Section 10. One type involves the factual situation where there is a clear demonstration of substantial impairment of commercial navigation. In the other type, this Court articulated a factual navigation impairment test for situations where the Attorney General initiates injunctive proceedings. Both types of cases involved a determination that obstructions to navigable capacity had been created, and thus an interpretation of the first, rather than the third, clause of Section 10.

(i) *The Great Lakes Cases.*

The Circuit Court's opinion places its primary reliance on two decisions of this Court that dealt with sewage dilution diversions from Lake Michigan, *Sanitary Dist. v. United States, supra,* and *Wisconsin v. Illinois, supra.* Not only were those diversions not based on state authorized and regulated water rights, but they also resulted in extensively documented impairment of major commercial navigation on at least four of the Great Lakes. They reduced the annual Great Lakes shipping capacity by over three million tons, valued at the time at a cost of 88 cents per ton. That impairment affected seven states, an international treaty with Great Britain, four hundred harbors, and a hundred federally

improved channels (278 U.S. at 407-409, 49 S.Ct. at 167-179; 266 U.S. at 423, 426, 45 S.Ct. at 177-179).[12]

(ii) *United States v. Rio Grande.*

The Court of Appeals also relied on *United States v. Rio Grande, supra.* That decision, although enjoining storage of water on a non-navigable upstream portion of the Rio Grande River, did give serious consideration to the Congressional policy of deferring to State water rights law.

This Court went out of its way in *Rio Grande* to recognize that activities which otherwise would have only local significance and which normally present no federal issues should only be regulated where actual obstructions to needed navigable capacity are demonstrated. The Court stated:

> It does not follow that the courts would be justified in sustaining any proceeding by the attorney general to restrain any appropriation of the upper waters of a navigable stream. The question always is one of fact, whether such appropriation substantially interferes with the navigable capacity within the limits where navigation is a recognized fact. (174 U.S. at 709, 19 S.Ct. at 777).

Rio Grande is particularly relevant to the present case. It specifically addressed the relationship of federal navigation interests to state water rights law by illustrating the statement quoted above, with the following example:

> In the course of the argument, this suggestion was made, and it seems to us not unworthy of note, as illustrating this thought. The Hudson River runs within

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[12]Petitioners submitted to the Court of Appeals for Judicial Notice, excerpts from the following public documents that are on file with this Court in *Sanitary District v. U.S., supra*:

1. Pages 92 and 94 and 118 and 119 of the General Index to the Transcript of Record, Volume A
2. Index pages I to V and pages 87 to 117 of the Brief for Appellee United States
3. The Amicus Curiae Brief of the Lake Carriers Association.

Petitioners hereby request that this Court take judicial notice of those documents which are in its files.

> the limits of the state of New York. It is a navigable stream and a part of the navigable waters of the United States, so far at least as from Albany southward. One of the streams which flows into it and contributes to the volume of its waters is the Croton river, a non-navigable stream. Its waters are taken by the state of New York for domestic uses in the city of New York. *Unquestionably the state of New York as a right to appropriate its waters, and the United States may not question such appropriation, unless thereby the navigability of the Hudson be disturbed.* On the other hand, if the state of New York should, even at a place above the limits of navigability, by appropriation for any domestic purposes, diminish the volume of waters, which, flowing into the Hudson, make it a navigable stream, to such an extent as to destroy its navigability, undoubtedly the jurisdiction of the national government would arise and its power to restrain such appropriation be unquestioned; and, within the purview of this section it would become the right of the attorney general to institute proceedings to restrain such appropriation. (174 U.S. at 709, 19 S.Ct. at 777, emphasis added)

If the Circuit Court's interpretation of the 1899 Act is sustained, this quotation will no longer be the law. Under the Circuit Court's theory, the United States could have challenged New York's appropriation even if the navigability of the Hudson River had remained undisturbed, as long as there was *any* alteration of the condition or capacity of the navigable stream. Since storage of water in a reservoir automatically alters downstream river flows, the Circuit Court's interpretation of the 1899 Act automatically subjects all dams located on tributaries of navigable waters to its permitting procedures and regulatory control. This clearly shows the extent to which the Circuit Court's holding alters the traditional federal "hands-off" policy with respect to local water projects and modifies the underlying basis for the *Rio Grande* decision.

Rio Grande clearly articulated the policy which existed when Congress adopted the 1899 Act and which Congress

has continued to follow. That policy is that federal statutes should not be construed to impose federal regulatory control over state regulated water rights diversions, unless those diversions alter flows in a manner that unreasonably and substantially impairs the stream's capacity to support established navigation. The Circuit Court opinion failed to apply this policy and thereby directs the United States to involve itself in any diversion of water from a navigable stream.

III.

THE CIRCUIT COURT OPINION IMPROPERLY REFUSED TO RECOGNIZE THE ADEQUACY OF THE SECTION 10 PERMIT ISSUED TO THE STATE PRIOR TO THIS ACTION.

If the challenged SWP water supply diversion operations should fall within the ambit of Section 10, they are, in fact, already covered within the scope of the Section 10 permit[13] that the Corps of Engineers issued to the State in June 1967. The Corps issued the Permit:

> . . . to cut the westerly levee of West Canal, for the purpose of constructing an inlet structure for Clifton Court Forebay, Contra Costa County, as shown on the reverse of this notice." (Jt. App., p. 119a; State Exh. 25, *supra*)

The State made the levee cut and constructed the control structure in order to provide the diversion works for the SWP Delta Pumping Plant, by way of Clifton Court Forebay (Ptn. App., pp. 70-71). Condition (f) of the Permit specifically reserves to the Secretary of the Army authority to require the State:

> . . . to remove or alter the structural work or obstructions caused thereby without expense to the United

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[13]The Permit was designated No. 4101. It was introduced as Plaintiffs' Exhibit 24 and is set out, along with its related public notice, on pp. 115a-119a of the Joint App.

> States, so as to render navigation reasonably free, easy and unobstructed. (Jt. App., p. 117a, para. (f).)

The Permit also conditions that authority on a determination by the Secretary of the Army that the levee cut and the control structure:

> . . . shall cause unreasonable obstructions to the free navigation of said water. (*Id.*)

Thus, the State's pre-existing Section 10 permit expressly preserves the federal navigation interest as it had been understood for the first 67 years of the 1899 Act. The Circuit Court, however, rejected Permit 4101 as adequate Section 10 compliance (Ptn. App., pp. 50-51). The apparent basis for that rejection is that the permit does not authorize construction of the Delta Pumping Plant itself (Ptn. App., p. 50). That plant, of course, was not constructed in navigable waters and was constructed solely at State expense (Jt. App., pp. 89a, 91a-93a). Nevertheless, the opinion recognizes that Permit 4101 preserves the Corps' authority to prevent unreasonable obstructions to navigation both by its terms, and under Corps' Regulation 33 CFR 325.7(a)(1978) (Ptn. App., p. 51, n. 37).

Obviously, the Circuit Court requires that a Section 10 permit must regulate more than obstructions to navigation. Indeed, it even raises the possibility of federal abolition of the Delta Pumping Plant altogether (*Id.*). But, even if the SWP Delta diversion operations did fall within the ambit of Section 10, the construction of state facilities on dry land clearly does not. There is, therefore, no justifiable basis for the Circuit Court's refusal to recognize the adequacy of Permit 4101 as discharging all of the State's Section 10 responsibilities arising from its SWP water diversion operations.

CONCLUSION.

The Circuit Court opinion invokes an 80-year old statute as a vehicle for expanding federal litigation over, and federal regulation of, matters traditionally relegated to state law.

That expansion reflects not only a misreading of Congressional intent in 1899, it also reflects a misreading of Congressional intent in 1980. This is, after all, a time of public disenchantment with the proliferation of federal litigation and regulation.

The Circuit Court's expansion of the 1899 Act also reflects a misreading of the decisions of this Court. Those decisions have carefully, and recently, articulated a clear criteria for determining the existence of a private right of action under federal statutes. However, the Circuit Court has ignored important portions of that criteria and consequently has superimposed its view of "utility" on that expressed by Congress. The result will be more, rather than less, litigation before the federal courts, over matters that would otherwise be litigated in the state courts.

Similarly, the decisions of this Court have consistently recognized the substantial Congressional policy of allowing the states to allocate their water supplies under state law. The Circuit Court opinion would, on the other hand, superimpose a new level of federal control that is essentially unrelated to the purpose of the 1899 Act. This new level of control is, however, based on a strained interpretation of Section 10 of the Act, that does not provide any additional tangible protection for the federal navigation servitude.

For these reasons, we therefore urge this Court to reverse the judgment and opinion of the Circuit Court and order dismissal of this action.

Respectfully submitted,

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APPENDIX.

Pertinent Sections of Rivers and Harbors Act of 1899.

Section 10, Rivers and Harbors Act of 1899:

Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in.

"The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same. 33 U.S.C. § 403.

Section 12, Rivers and Harbors Act of 1899.

Penalty for wrongful construction of bridges, piers, etc.; removal of structures.

Every person and every corporation that shall violate any of the provisions of sections 401, 403, and 404 of this title or any rule or regulation made by the Secretary of the Army in pursuance of the provisions of section 404 of this title shall be deemed guilty of misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or

by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any district court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States. 33 U.S.C. § 406.

Section 17, Rivers and Harbors Act of 1899.

Duty of United States attorneys and other Federal officers in enforcement of provisions; arrest of offenders.

The Department of Justice shall conduct the legal proceedings necessary to enforce the provisions of sections 401, 403, 404, 406, 407, 408, 409, 411, 549, 686, and 687 of this title; and it shall be the duty of United States attorneys to vigorously prosecute all offenders against the same whenever requested to do so by the Secretary of the Army or by any of the officials hereinafter designated, and it shall furthermore be the duty of said United States attorneys to report to the Attorney General of the United States the action taken by him against offenders so reported, and a transcript of such reports shall be transmitted to the Secretary of the Army by the Attorney General; and for the better enforcement of the said provisions and to facilitate the detection and bringing to punishment of such offenders, the officers and agents of the United States in charge of river and harbor improvements, and the assistant engineers and inspectors employed under them by authority of the Secretary of the Army, and the United States collectors of customs and other revenue officers shall have power and authority to swear out process, and to arrest and take into custody, with

or without process, any person or persons who may commit any of the acts or offenses prohibited by the said sections, or who may violate any of the provisions of the same: *Provided,* That no person shall be arrested without process for any offense not committed in the presence of some one of the aforesaid officials: *And provided further,* That whenever any arrest is made under such sections, the person so arrested shall be brought forthwith before a commissioner, judge, or court of the United States for examination of the offenses alleged against him; and such commissioner, judge, or court shall proceed in respect thereto as authorized by law in case of crimes against the United States. 33 U.S.C. § 413.